Filed 7/20/09 Steven M. Kramer & Assocs. v. Nance CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

STEVEN M. KRAMER & ASSOCIATES, LTD. et al., Plaintiffs and Respondents, v. WILEY NANCE, Defendant and Appellant.	B202341 (Los Angeles County Super. Ct. No. BC349502)

APPEAL from an order of the Superior Court of Los Angeles County. Paul Gutman, Judge. Affirmed.

Law Offices of Ray W. Sowards and Ray W. Sowards for Defendant and Appellant.

Dion-Kindem & Crockett and Peter R. Dion-Kindem for Plaintiffs and Respondents.

Defendant Wiley Nance (Nance) appeals from an order denying his motion to set aside a default and default judgment, in an action for breach of contract and quantum meruit brought by Steven M. Kramer & Associates, Ltd., and Rosemary Chin (plaintiffs). We are mindful that """the law strongly favors trial and disposition on the merits""" and that that """any doubts in applying [Code of Civil Procedure] section 473 must be resolved in favor of the party seeking relief from default [citations]."""" (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 695 (*Fasuyi*).) Because of procedural obstacles largely created by Nance, we do not find an abuse of discretion here, on what was Nance's third unsuccessful effort to attack his default.

FACTS AND STATEMENT OF THE CASE

Plaintiffs' First Amended Complaint ("FAC") was filed on March 24, 2006. Plaintiffs alleged two causes of action, breach of contract and quantum meruit, against Nance and 100 DOE defendants. Plaintiffs' claims arose out of a finder's fee of one-half percent of the $10 billion face amount of mid-term notes to be purchased by Well International Holdings, Ltd. (Well), after plaintiffs introduced Well to Nance, and Nance and Well entered into the purchase agreement attached to the FAC ("Agreement"). Plaintiffs further alleged that before entering into the Agreement, plaintiffs provided Nance's agent, Robert Franks, with a copy of the fee agreement between plaintiffs and Well, which put Nance on notice that the intermediaries in the transaction on the buyer's side, including plaintiffs, would receive a one-half percent fee of the face amount of instruments purchased under the Agreement, and that this fee comported with custom and practice known to Nance.

Plaintiffs alleged that Nance breached the Agreement by repudiating and failing to perform; as a result of that breach, plaintiffs were damaged in the amount of $6.25 million, the fee they would otherwise have received. Under the quantum meruit claim, plaintiffs sought the reasonable value of their services, which they alleged to be at least $12.5 million. In their prayer for relief, plaintiffs sought $12.5 million in compensatory damages.

Nance was personally served with the FAC on April 12, 2006, in San Jose. On May 15, 2006, without having notified Nance of their intentions, plaintiffs filed a request for entry of default, seeking a judgment of $12.5 million plus interest and costs. Default was entered on May 15, 2006. On August 10, 2006, Nance filed the first of what were to be three motions to vacate "default and default judgment."

In his declaration accompanying the first motion, Nance stated that after being handed the complaint, he had prepared a motion to dismiss "as his answer," which was filed in court with a copy sent to plaintiffs' counsel. He claimed never to have received notice of default. (We note that the May 15, 2006 request for default included a proof of service by mail on Nance on that date. He also claimed to have been surprised to learn — he does not say when — that default had been entered on May 15th, although he admitted having received the Notice of Case Management setting a case management conference for July 24, 2006. At that point, he hired his first counsel — Mr. Krauss — to file his first motion to vacate default. Nance also denied signing the Agreement, and stated that his signature was forged. He disclaimed knowing, or knowing of the plaintiffs, and owning any notes, let alone worth $10 billion.

In his supporting legal memorandum, Nance sought relief under Code of Civil Procedure section 473,[1] citing its liberal application to motions seeking relief from default, and lack of subject matter jurisdiction based on plaintiffs' failure to allege Nance's residence or the place of performance of the finder's services. As required by section 473, subdivision (b), the motion included a proposed answer to the FAC.

In their opposition, plaintiffs argued that Nance had not made an evidentiary showing of mistake, inadvertence, surprise, or excusable neglect, nor had he brought the motion within a reasonable time, both required by section 473, subdivision (b). Plaintiffs noted Nance's failure to include a copy of his purported motion to dismiss in the motion to vacate and that, in fact, there was no such motion to dismiss in the trial court's records.

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[1] All further statutory references are to the Code of Civil Procedure.

On September 26, 2006, the trial court denied the motion to vacate, stating that its reasons were reflected in the court reporter's notes; this transcript was not included in the appellate record. The court also denied plaintiffs' application for entry of default judgment, and referenced plaintiffs' counsel to the law clerk's memorandum detailing deficiencies in the default package. The court set a further status conference regarding the status of entry of default judgment for October 27, 2006.

Nance, still being represented by attorney Krauss, filed his second motion to vacate default and default judgment on October 20, 2006. This time, Nance declared that he had prepared the aforementioned motion to dismiss a few weeks after reading the FAC, but had not filed it. Rather, he sent it to plaintiffs' counsel, believing counsel would either dismiss the case or file the motion with the court. Nance assumed that "the court was going to hear my motion at that time." Nance attached a copy of the motion to dismiss to his declaration. That motion consisted of a one page statement asserting that (1) plaintiffs had failed to state a claim by not attaching the Agreement to the complaint and failing to join unidentified indispensable parties; and (2) Los Angeles was an inconvenient forum in light of defendant's residence in San Jose.

In opposition to the motion, plaintiffs made the same arguments they made to defeat the first motion to vacate, but added that there was even less ground for relief because defendant was changing his story. He now was contending that he never filed his motion to dismiss with the court, but instead, only sent a copy to opposing counsel with the belief that opposing counsel would file the motion for him. Opposing counsel countered by quoting the language of the summons of the FAC, which demonstrated that defendant's new-found belief was "patently absurd," and proffered his own declaration that defendant never contacted him after mailing the motion to dismiss to inquire whether he would file it with the court or dismiss the case. According to plaintiffs' notice of ruling, on January 9, 2007, the trial court denied Nance's second motion to vacate, and set a default prove-up hearing for February 23, 2007.

On April 26, 2007, the court granted default judgment in the amount of $14,007,325.40, comprising damages of $12.5 million, prejudgment interest of

$1,506,850.40, and costs of $475. The judgment recited that proof had been by plaintiff's declaration. Neither that declaration, nor any other part of the default package is part of the record before us. Judgment was entered that day. On May 23, 2007, plaintiffs sent Nance and attorney Krauss notice of the entry of default judgment. Nance did not take an appeal from that entry of default judgment.

On June 15, 2007, Nance, represented by current appellate counsel, filed a third motion to set aside default and default judgment. New counsel stated his theme succinctly: "This is a case where a *pro per* defendant fell victim to the disservice of two Officers of the Court: Plaintiffs' counsel for standing mute at a time when he should have acted; and by Mr. Krauss for bringing (and losing) what should have been an obviously meritorious motion."

Defense' counsel supported this assertion with two declarations from his client. In the first one, Nance claimed not to have had money to hire a lawyer when served so he asked an attorney friend in Florida, Mr. Franks, to prepare the motion to dismiss, and to have proceeded under the mistaken belief that the motion would resolve the case. For the first time—having failed to mention it in his prior two motions—he referenced a May 9, 2006 letter,[2] he asserts he sent to plaintiffs' counsel, in which he told counsel that he was not the person named in the lawsuit and that he was willing to undergo a handwriting analysis. That letter is not attached to the declaration. Nance stated that plaintiffs' counsel never replied, and reiterated that he hired Mr. Krauss upon receiving notice of default. He added that the entry of default judgment was a "complete surprise" because he believed that he had protected his interests by communicating with "someone in apparent authority . . . ."

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[2] In the accompanying legal memorandum, Nance's counsel stated that this letter was attached as Exhibit A. In fact, the letter was not attached to the legal memorandum. Nor did Nance attach it to his reply papers even after plaintiffs' opposition alerted him to the absence of any attached exhibits.

In a June 21, 2007, "amended declaration," Nance repeated the foregoing, but added that motion was based on facts different from "the previous Motion to Vacate Default and Default Judgment" because the previous one was "boilerplate" and "poorly researched, and utterly ineffectual," and did not discuss the May 9, 2006 letter. For the first time yet again, he contended that opposing counsel breached ethical duties owed *to him* "triggered by [Nance's] incorrect response to the lawsuit." In the accompanying legal memorandum, now written by new counsel, Nance argued that opposing counsel had an ethical duty to inform Nance, a pro per and stranger to the legal process, before he sought entry of Nance's default and violated an ethical duty owed to Nance when he did not file Nance's motion to dismiss with the court or inform Nance that Nance was proceeding erroneously. This was all the more true because Nance had evidenced his intent to defend against the lawsuit by sending his motion to dismiss, albeit never filing it with the court. Nance cited *Smith v. Los Angeles Bookbinders Union No. 163* (1955) 133 Cal.App.2d 486 (*Smith)*, disapproved on another ground in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551, and *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036 (*Bellm*), in support of the existence of these ethical obligations.

In opposition to Nance's claimed ignorance of having to file an answer upon receipt of the FAC, plaintiffs cited the extensive warnings in the summons.[3] Instead of

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[3] "You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. [¶] There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-

filing any document with the court, Nance sent the motion to dismiss to plaintiffs' counsel and did nothing even upon receiving the notice of the case management conference. Months later, in August, 2006, he filed the first of his motions to vacate, which was denied, and then filed a second one in October, 2006, which was also denied. Plaintiffs urged that the third motion was doomed because (1) Nance had not presented any new facts or law to give the court jurisdiction under section 1008; (2) it was untimely under the six-month deadline in section 473, subdivision (b), having been filed 13 months after entry of default; (3) contrary to Nance's professed ignorance about the transaction described in the FAC, Nance's new counsel admitted that Mr. Franks (the author of the motion to dismiss) had confirmed to Nance's counsel that Nance had been involved in that transaction; and (4) plaintiffs' counsel had no ethical obligation to file Nance's motion to dismiss or advise him how properly to respond to the FAC, or to warn him in advance of seeking entry of default.

In reply, Nance argued that the cumulative effect of all the errors described in the motion constituted extrinsic mistake not subject to the six-month limitation in section 473, subdivision (b). Nance conceded that "there is no statutory rule or requirement" on the part of a plaintiff's counsel to warn defendant before taking his default, but asserted that the failure to do so was grounds alone for relief under section 473, subdivision (b), again relying on *Smith* and *Bellm*. Nance also conceded that opposing counsel had no duty to render advice to Nance. Nance argued that opposing counsel committed a "sin of omission," and although conceding it was not binding under California law, cited Rule 4.4, subdivision (b), of the American Bar Association's Model Rules of Professional Responsibility, which addresses the duty of counsel to notify the sender of a document when he or she "knows or reasonably should know that the document was inadvertently sent . . . ," Nance's counsel asserted that Nance was "sucker-punch[ed]" by opposing

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Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association." (Judicial Council Forms, form SUM-100.)

counsel's failure to return the motion to dismiss or to tell him that it was filed in the wrong place.

In a supplemental declaration, this one attached to the reply, Nance changed his contentions once again. He declared that he did not know that default had been entered until January 5, 2007. This contention is contradicted by his filing of two motions before that date seeking to vacate that default.

At the hearing on August 14, 2007, the court observed that 13 months had passed since entry of default, more than the six-month period set forth in section 473, subdivision (b), and that the motion did not raise any new or different grounds from those in the prior two motions to vacate that default. Defense counsel admitted that he had not even been aware of the second motion until he received the opposing papers. He, nonetheless, argued that extrinsic mistake induced by opposing counsel's violation of his "ethical obligation" to inform Nance that opposing counsel's office was not the proper place to file papers was not raised in the prior motions and that the "first two attempts probably weren't attempts at all."

The court observed that there was no ethical obligation to respond, or to give notice before taking a default. Quoting the language in the summons, the court expressed skepticism about Nance's theory of extrinsic mistake, to wit, Nance's belief that sending letters to opposing counsel was a sufficient response. Defense counsel then argued that by sending letters to opposing counsel, Nance did not "slump on his rights" and should be given the same respect as an attorney, and that "opposing counsel should have at least sent it to the court or sent it back" with the admonition that it had been sent to the wrong place. The court denied the motion to vacate, but refused to impose the sanctions being requested by plaintiffs.

Plaintiffs served notice of ruling on August 15, 2007. Nance filed his notice of appeal from the order denying the motion on September 18, 2007.

DISCUSSION

Denial of a motion for relief under section 473, subdivision (b) is subject to review for abuse of discretion. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) We find no abuse of discretion here and affirm because (1) even if we, *arguendo*, have an appealable order, Nance did not state any facts or law that was not accessible to him in his prior motions, and the trial court therefore correctly concluded that section 1008 deprived it of jurisdiction to entertain Nance's third attempt; and (2) Nance's third motion was untimely under section 473, subdivision (b), and there was no extrinsic mistake because plaintiffs' counsel did not violate any legal obligation in failing to warn Nance before taking his default or to advise him that his motion to dismiss was not a proper response to the FAC.

It is debatable whether we have jurisdiction to entertain the present appeal because this appeal does not raise any issues that could not have been raised in an appeal from the default judgment itself and Nance failed to appeal from that default judgment. "[I]f the grounds upon which the parties seek to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the motion. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set is aside." (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 229.)[4]

In *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, regarding whether a post-judgment order denying attorneys' fees was an appealable order, the Supreme Court recognized the broad language in Civil Code of Procedure, section 904.1 (in 1993,

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[4] Accord *Litvinuk v. Litvinuk* (1945) 27 Cal.2d 38, 44 ["Stated differently, if the grounds upon which the party sought to have a judgment vacated existed before the entry of judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying the motion."]

contained in subdivision (b), but today, in subdivision (a)(1)), but observed that not all post-judgment orders are appealable:

"Despite the inclusive language of Code of Civil Procedure section 904.1, subdivision (b), not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a post judgment order must satisfy two additional requirements . . . . The first requirement — not discussed by the Court of Appeal — is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. (See *Rooney v. Vermont Investment Corp*. (1973) 10 Cal.3d 351.) "The reason for this general rule is that to allow the appeal from [an order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment." (*Id*. at p. 358.) In the present case, an appeal from the order denying attorney fees pursuant to Code of Civil Procedure section 2033, subdivision (o), plainly raises issues different from those arising from the judgment itself. Thus, this requirement is satisfied." (*Lakin v. Watkins Associated Industries, Inc., supra*, 6 Cal.4th at p. 651.)

We recognize that although acknowledging the general rule articulated above, Professor Witkin opines that "it has become an established rule that an appeal lies from the denial of a statutory motion to vacate an appealable judgment or order, i.e. from denial of a motion made under [§] 473 . . . ." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 200, pp. 275-276 [citing, among other cases, *Spellens*].) We query whether this same "established rule" would apply here, where the post-judgment motion to vacate the entry of default plows through the same ground tilled in the two pre-judgment motions to vacate default under section 473, subdivision (b) and defendant failed to appeal from the default judgment itself. We do not have to resolve this conundrum in

light of our findings regarding lack of jurisdiction under section 1008, subdivision (e)[5] and no extrinsic fraud relieving defendant of the statutory deadline for seeking relief under section 473, subdivision (b).

We also recognize that although all three motions were styled as motions to vacate default and default judgment, only the motion before us was brought after default judgment had been entered. Theoretically, a motion to vacate a default judgment could raise different issues from a motion to vacate entry of default. Here, however, the post-judgment motion to vacate default and default judgment was a rehash of the two pre-judgment motions to vacate default. Appellant has not attacked the merits of the default judgment; he did not even include the default package in the record. Nance's third motion raised the same matter — relief under section 473, subdivision (b), from entry of default — posited in the prejudgment motions to vacate default. "The name of the motion is not controlling. The above requirements [i.e., including having to be based on new or different facts, circumstances or law] apply to any motion that asks the judge to decide the *same matter* previously ruled on." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 9:324.1, p. 9(I)-119 [emphasis in the original, citing *Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 878; *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 373].) The procedural history recounted above demonstrates that Nance failed to provide any new facts or law not accessible to him in the prior motions to support reconsideration of the denials of those first two motions.

Nance does not dispute that the motion before us was filed outside the six-month deadline provided in section 473, subdivision (b), and that this would be ground alone to affirm the trial court. Instead, he argues that opposing counsel's ethical violations, taken

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5 Section 1008, subdivision (e) provides, in pertinent part: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions . . . . No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

together with Nance's self-proclaimed ignorance about the legal process, constitute "extrinsic mistake" taking Nance outside the six-month stricture. We agree with the trial court that opposing counsel did not transgress any legal obligation to Nance, and find that Nance's default wounds were largely self-inflicted.

First, Nance cites no authority for the proposition that *opposing* counsel had an obligation to counsel him on how to respond to the FAC when opposing counsel received Nance's motion to dismiss. And there is none. To the extent Nance relies on Rule 4.4, subdivision (b) of the American Bar Association Model Rules of Professional Responsibility, even if, *arguendo*, that rule were binding in California, it is inapplicable on its face. Its subject is a document "inadvertently" sent to opposing counsel. Not even Nance contends that he did not mean to send opposing counsel a copy of his motion to dismiss.

Second, we acknowledge case law and learned treatises that state that professional courtesy supports warning a defendant before taking his default. (*Fasuyi, supra*, 167 Cal.App.4th at pp. 701-702.) These same authorities, including the *Bellm*[6] and *Smith* cases on which Nance relies, disavow any "legal obligation" to do so, although, depending on the "totality of the circumstances," caution that the failure to warn sometimes may be a basis for granting relief from a default. (*Id*. at p. 703.)

One such case is *Fasuyi, supra*, where default was entered after a product's liability complaint had been forwarded to the defendant's insurance company and the insurance company failed to respond to the complaint. Finding that defendant was innocent as to the events that led up to the entry of default and that there was literally no factor in favor of allowing the default to stand, the appellate court reversed the trial court's denial of defendant's motion to vacate for abuse of discretion. Even so, the

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6 Indeed, despite advocating such professional courtesy, the *Bellm* appellate court, upheld the trial court's refusal to set aside a default judgment even when defendant declared that he neglected to answer the complaint because of the press of his business during the Christmas season and recent deaths of his parents. (*Bellm, supra*, 150 Cal.App.3d at p. 1038.)

appellate court cautioned: "We do not mean to suggest, and certainly do not hold . . . that a plaintiff's attorney must warn a defendant's attorney before taking a default. We recognize that each situation is sui generis and must be analyzed accordingly." (*Fasuyi, supra,* 167 Cal.App.4th at p. 703.)

The "totality of the circumstances" is entirely different here. Nance claims to have been a victim because he was in pro per. In fact, he had counsel assisting him with respect to every motion he sent or filed regarding the FAC, the entry of default and the entry of default judgment. He chose those counsel; the wisdom of those choices is not before us. Nance filed with his motions to vacate a series of declarations all under penalty of perjury. In those declarations, he often contradicted himself and the record, sometimes to the point of straining credulity. Nance failed to appeal the default judgment. In short, if there is any blame to go around, it should be laid at Nance's doorstep. Contrary to his counsel's hyperbole, Nance was not the victim of opposing counsel's purported ethical lapses. Under these circumstances, the trial court was well within its discretion to deny Nance's motion to vacate default judgment.

This case is a far cry from *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, on which Nance relies for his appeal to equity. There, defendants had a friend, an Arizona attorney, call the clerk's office for the Los Angeles Superior Court to determine the fee for filing their answer. The clerk gave them misinformation, which caused the answer to be initially rejected and ultimately to be filed eight days late. In the meantime, plaintiff had obtained entry of default on the same day on which he applied for such entry with notice to defendants of that application only by mail. In addition, when defendants learned of the entry of default, plaintiff's counsel misinformed defendants that they could not claim that the default was taken through inadvertence, mistake or excusable neglect, apparently causing defendants to miss the statutory deadline for seeking relief from default. (*Id.* at p. 979.) Defining extrinsic mistake as mistake that led "'the court to do what it never intended . . . '", the Supreme Court held that relief under section 473, subdivision (b) should have been granted because the default was due to the clerk's misunderstanding as to the amount of the filing fee and opposing counsel's affirmative

misstatement of the law. (*Id*. at p. 984.) Contrary to Nance's argument here, the Supreme Court expressly eschewed basing its ruling on defendants' pro per status: "These facts govern our decision, rather than a view that defendants' improvident initial self-representation particularly entitles them to the balm of relief from default. Procedural law cannot cast a sympathetic eye on the unprepared, or it will soon fragment into a kaleidoscope of shifting rules." (*Id*. at p. 979).

Plaintiffs seek $3,600 as sanctions under California Rules of Court, rule 8.276(a)(1) for filing a frivolous appeal. We are not prepared to find that the appeal was frivolous, and thus deny plaintiffs' request for sanctions.

DISPOSITION

The order is affirmed. Plaintiffs' request for sanctions is denied. Costs on appeal are awarded to plaintiffs.

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BENDIX, J.*

We concur:

RUBIN, Acting P. J.

FLIER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.